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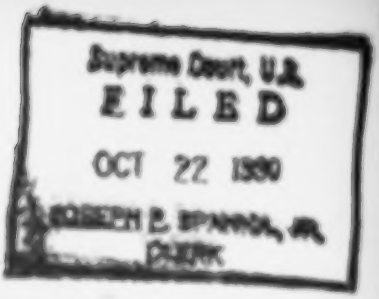

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL H. BENNETT,

Petitioner

versus

Governor Bob Graham
John E. Lawrence
Mark Luther Patrick
Barbara Linthilum
Ed Austin
Ralph Greene
Kim Hammond
L.A. Morris Doyle
Lawrence David Dempsey
Charles Terrell
Steve Parton
Baker King
Stephen Kahn
Joanne Harvey Scott

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a litigants right of "Equal Protection" under the law is at risk when defined procedures are not followed by the Clerks of The U.S. District Courts.

II. In order to avoid a conflict, whether all Clerks in all of the circuits of the U.S. District Courts should follow the same procedures as demanded by The United States Court of Appeals.

III. Whether all Clerks in all of the circuits of the U.S. District Courts should give written notice to all litigants of the importance of filing a timely appeal or Motion for an extension of time to file a late appeal at the time judgement is entered.

IV. In order to avoid a conflict should Clerks of The U.S. District Courts screen pro se filing of notice of appeal to be sure they are timely and if not to give notice that a Motion for extension of time to file is necessary to preserve the appeal.

V. Whether or not the court of appeals erred, by not accepting jurisdiction.

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.

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versus

Governor Bob Graham	L.A. Morris Doyle
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Mark Luther Patrick	Charles Terrell
Barbara Linthicum	Steve Parton
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Ralph Greene	Stephen Kahn
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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Daniel H. Bennett, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, of the Eleventh Circuit entered on July 23, 1990.

OPINIONS BELOW

The order affirming Magistrate's order, and granting motions to dismiss, etc. Entered on the 21st day of March, 1990 in the U.S. District Court appears at page 9 of the Appendix herein.

The notice of appeal filed by Petitioner in the U.S. District Court on April 19, 1990 appears at page 27 of the Appendix herein.

The memorandum to all parties from the U.S. Court of Appeals in reference to question of Jurisdiction and dated May 14, 1990 appears at page 28 of the Appendix herein.

Plaintiff's (Petitioner) response to question of Jurisdiction dated 29th of May, 1990 appears at page 31 of the Appendix herein.

The U.S. Court of Appeals dismissal for lack of Jurisdiction is found at page 35 of the Appendix herein.

JURISDICTION

The judgment of the Court of Appeals was entered July 23, 1990.
The jurisdiction of this Court is invoked pursuant to 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States;

All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

THE PETITIONER/PLAINTIFF first filed this case in the U.S. District Court on August 15, 1986. The events that gave rise to Plaintiff's complaint was his suspension and later removal from his elected position of Sheriff of Flagler County Florida. The complaint was also filed as pro se. The Plaintiff based his suit on 42 U.S.C. § 1983 and alleged the defendants violated his constitutional rights.

On September 22, 1987, Plaintiff filed his Amended Complaint, also pro se. The Amended Complaint was also based on 42 U.S.C. 1983 alleging violations of Constitutional rights.

On March 21, 1990, the U.S. District Court (in the absence of any hearing on the merits) dismissed with prejudice the Plaintiff's Amended Complaint.

On April 19, 1990, the Plaintiff filed a Notice of Appeal by way of U.S. Mail to the Clerk of the U.S. District Court. However, the Clerk apparently received the Notice on April 24, 1990. The Clerk did not send any notice to the Plaintiff of a late filing of an Appeal and to file a Motion for extension of time in order to preserve the Appeal.

On May 14, 1990, the U.S. Court of Appeals sent a Memorandum to all parties for each to respond to the Appeal's Court Question of Jurisdiction.

On May 29, 1990, the Plaintiff filed his Response to the Question of Jurisdiction in person with the U.S. Court of Appeals.

On April 23, 1990, the U.S. Court of Appeals dismissed the Plaintiff's Appeal for lack of Jurisdiction and cited Fed.R.App.P. 4(a) (1); Campbell v. Wainwright, 726 F.2d 702 (11th cir. 1984).
At present no other issues are before the Court below to be resolved in this matter.

REASONS FOR GRANTING OF WRIT

(1) To set a uniformity of procedures for the clerks of the U.S. District Courts to follow at the time a judgment is entered.
(2) To determine whether pro se complaints are given the same consideration as those filed by legal counsel.
(3) To resolve any present or future conflict of the application of procedures that are determined based upon the circuit one may reside in.
(4) To determine by the merits of this case whether pro se cases receive "equal protection of the law".
(5) This is the Court of last resort for this pro se.

ARGUMENT

The Petitioner believes his right of Appeal would have been preserved if the Clerks of the U.S. District would follow the procedures that had been clearly defined and set forth in setting a national uniformity of Appeals solely to avoid conflicts, especially in pro se cases.
Campos v. Lefevre 825 F.2d 671 (2nd cir. 1987).

In the Petitioner's Response to the Question of Jurisdiction to the U.S. Court of Appeals, he raised several issues that should have been given consideration. The petitioner argued;

(1) That he receives his mail via a post office box and when the box was checked on Saturday prior to April 17, 1990 there was not a notice to pick up any mail at the main window. However when he checked his mail on April 17, 1990 it did contain a notice to pick up mail at the main window and that mail contained the judgment that had been entered by the U.S. District Court on March 21, 1990.

(2) The petitioner filed a Motion for Appeal by way of U.S. Mail.

(3) The petitioner brought to the Appeals attention that the District Court's judgment was absent of any notice from the Clerk Relating to the importance of filing a timely Appeal or Motion for extension of time.

(4) After the Clerk of the U.S. District Court received the petitioner's apparent late Notice of Appeal the Clerk failed to advise the petitioner of an untimely filing and to request a Motion for extension of time in order to preserve the Appeal.

The petitioner feels there has been an apparent conflict of the filing of Appeals as far back as 1944. The apparent first decision was in Hill v. Hawes, 320 U.S. 520, 64 S.Ct. 334, 88 L.Ed 283 (1944). The Court held that when a clerk failed to notify the parties at entry of judgment the judgment would be vacated and a new judgment entered. The time of Appeal would run from the entry of the 2nd judgment.

This caused a 1946 amendment to former Fed.R.Civ.P. 73(a) that allowed the thirty day appeal deadline to be extended for a determination of "excusable neglect based on a failure of a party to learn entry of the judgment".

This rule was amended again in 1966 to allow the District Court the power to extend the Appeal time for no more than 30 days simply "upon showing of excusable neglect". See Wright, Miller, Cooper and Gressman, 16 Federal Practice and Procedure 3950 at 366 & n. 13 (1977).

In Campos v. Lefevre 825 F.2d 671 (2nd dir. 1987) it appears a very in depth review was given to the history of Appeals in order to set a national uniformity on the filing of Appeals. The decision made it unanimously in all circuits the time of Appeals and the type of Notice or Motion for extension of time to be filed.

It was also directed in Campos that Clerks of U.S. District Courts:

> "screen notices of appeal for timeliness and advise pro se litigants, of the appropriateness of an extension motion. We further direct that district court clerks prepare a notice to be given all litigants, whether or not pro se and whether they are Plaintiffs or defendant at the time when judgment is entered. This notice is to inform the litigants of the time limitations for filing a notice of appeal under Fed.R.App.P. 4 and of the necessity of filing a timely motion for extension within the thirty day extension period if the notice of appeal is untimely."

It was also noted in order for the district courts to establish the necessary procedure for the new practice of dismissing untimely appeals would not take effect until thirty-one days after the filing of the opinion in Campos. See Campos v. Lefevre already cited at page 675 & 676 at (3,4) (5).

The petitioner argues that if the decision in Campos determines the uniformity of the timeliness of notice to appeal and the requirement of filing a motion for extension to file a late appeal Campos also set forth the procedures for the clerks of District Courts to follow when judgment is entered and a late appeal is filed by a pro se.

The petitioner argues that if in fact the same procedures are not followed in all districts the petitioner's right of "equal protection under the law" is at risk because of the area or the state in which the petitioner resides. If "equal protection" is not present this procedure would appear to be violative of the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United States.

The petitioner argues that if the procedures in Campos are not followed especially in pro se cases there would be no way for the pro se to know whether they have complied to the letter of the law until the time for appeal had run. This would appear to put pro se individuals into a different class as related to those who practice law, therefore, denying them "equal protection of the law."

The petitioner argues the Court of Appeals in his case only considered the absence of a timely motion for extension of time to file a late notice of appeal based on "excusable neglect". Therefore ignoring the merits of the case based on the clerk failing to follow the procedures set forth in Campos.

The petitioner argues that since no consideration was given to the merits of his case that pro se complaints are not treated the same as those made by legal counsel which is violative of the "equal protection" clause of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, this Petition For a Writ of Certiorari ought to be granted.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 86-863-Civ-J-12

DANIEL H. BENNETT,
Petitioner

versus

GOVERNOR BOB GRAHAM, et al.,
Respondents

ORDER AFFIRMING MAGISTRATE'S ORDER, AND GRANTING MOTIONS TO DISMISS, ETC.

This cause is before the Court upon the following pending matters: (1) the Objection to the Court's [Magistrate's] Ruling on Denial of Discovery of the Defendants, filed herein on January 20, 1988, and supplemented on January 29, 1988; (2) Defendant L.A. Morris Doyle's Motion to Dismiss Amended Complaint, filed herein on October 7, 1987, to which responses were filed by plaintiff on October 28, 1987, and October 29, 1987; (3) the Motion to Dismiss filed herein on October 13, 1987, by defendants John E. Lawrence, Lawrence David Dempsey, Mark Luther Patrick and Charles Terrell ("Police Defendants"), with supplemental authorities filed on December 14, 1987, and March 1, 1988, and to which plaintiff filed responses on October 29, 1987, and March 16, 1988; (4) the Motion to Dismiss filed herein on October 16, 1987, by defendants Governor Bob Graham, Assistant General Counsel Barbara Linthicum, Assistant General Counsel Steve Parton, State Attorney Ed Austin, Assistant

State Attorney Baker King, Assistant State Attorney Ralph Greene, Special Master to the Florida Senate D. Stephen Kahn, and Judge Kim Hammond ("State Government Defendants"), to which plaintiff filed a response on November 4, 1987; and (5) the State Government Defendants' Motion for Summary Judgment, which was originally filed herein on February 4, 1987, renewed on October 1, 1987, and to which plaintiff filed responses on February 20, 1987, and October 21, 1987.

The Court heard oral argument on all pending motions on November 23, 1988. Upon consideration of the entire file, relevant law, and the arguments of plaintiff and of defendants' counsel, and for the reasons set forth below, the objection to the Magistrate's order will be overruled, the Magistrate's order will be affirmed, the motions to dismiss will be granted, the motion for summary judgment will be deemed moot and this action will be dismissed with prejudice as to all counts and all defendants.

Procedural Background

Plaintiff filed his original complaint, pro se, on August 15, 1986. The events giving rise to plaintiff's complaint were his suspension and later removal from the office of Sheriff of Flagler County. In his complaint, plaintiff sued sixteen defendants. He sued the Governor of Florida who suspended him, the persons who prosecuted the case against him, the special master who heard the case for the Florida Senate, the Florida Senate, the State of Florida and seven witnesses. The seven witnesses included a Circuit Court Judge, five police officers a woman who was allegedly sexually harassed and abused by plaintiff. Plaintiff bases his suit on 42 U.S.C. § 1983 and alleges that defendants violated his constitutional rights.

After all defendants filed motions to dismiss and plaintiff responded thereto, the Court reviewed the complaint and relevant law and dismissed the complaint on July 2,

1987, with leave to amend ("Dismissal Order"). In the Dismissal Order, defendants, the State of Florida and the Florida Senate were dismissed with prejudice. If plaintiff filed an amended complaint against any or all of the remaining fourteen defendants, the Court specifically required that he (1) state whether each defendant is being sued in his or her official or individual capacities, (2) plead his allegations of constitutional violations with specificity, and (3) allege sufficient facts to address the defense of immunity.

On September 22, 1987, plaintiff filed his Amended Complaint, pro se, based on 42 U.S.C. § 1983 seeking monetary relief from the fourteen defendants who had been dismissed without prejudice. The Amended Complaint is substantially the same as the original complaint.

The Amended Complaint has six counts. In Count I, plaintiff sues the Governor (Graham) and two attorneys employed as Assistant General Counsel of the Office of the Governor of the State of Florida (Linthicum and Parton). Plaintiff alleges, inter alia, the following: that his rights were violated when said defendants failed to give him notice that he was under investigation, informed the media that an investigation was being conducted, and failed to allege wrongdoing in the order authorizing the investigation. He alleges that defendants acted in concert and violated his right to equal protection and due process.

In Count II, plaintiff sues the State Attorney (Austin) and two Assistant State Attorneys (King and Greene) as well as the defendants sued in Count I. Plaintiff alleges that his rights were violated by his "prosecution" before the State Senate and not in a court of law in a criminal case. He alleges that the proceeding in such a forum placed him in a "no win" situation because evidence was withheld, discovery was denied, witnesses were granted immunity from perjury, and the standard was only "preponderance of the evidence." He was allegedly denied due process and equal protection

of the law.

In Count III, plaintiff sues the "Special Master" of the Florida Senate who presided over plaintiff's removal hearing in the Florida Senate (Kahn). Plaintiff's due process rights were allegedly violated when defendant Kahn amended the Governor's executive order and ordered plaintiff not to talk to a witness prior to the hearing.

In Count IV, plaintiff sues the two Assistant State Attorneys, a police officer (Doyle), and a private citizen-witness (Harvey) for conspiring to present fabricated testimony to the Florida Senate. Similarly, in Count V, plaintiff sues the two Assistant State Attorneys and a judge-witness (Hammond) for conspiring to present untrue testimony. Also, in Count VI, plaintiff alleges that there was a conspiracy among four police officers to present false testimony (Lawrence, Dempsey, Patrick, and Terrell).

After the filing of the Amended Complaint, the State Government defendants renewed a motion for summary judgment and all defendants except Jo Ann Harvey ("Harvey") filed motions to dismiss. Although Harvey did not file a motion to dismiss, she did file a personal letter on February 18, 1987, in which she vehemently opposes plaintiff's allegations and reiterates allegations about plaintiff which she made during plaintiff's removal hearing. Plaintiff opposed the motions to dismiss and sought to hold the motion for summary judgment in abeyance. He filed an objection when the Magistrate denied his request for discovery of the State Government defendants.

The objections to the Magistrate's order, grounds for the motions to dismiss, and motion for summary judgment will be addressed in turn below.

Objection to Magistrate's Order

On October 21, 1987, plaintiff filed a motion

requesting the Court to hold the State Government defendants' motion for summary judgment in abeyance until plaintiff was allowed discovery regarding the defendants. The State Government defendants argued in their response that they are entitled to absolute immunity because defendants' allegedly wrongful conduct arose from the performance of duties as prosecutor, judge or witness. If entitled to immunity, defendants are protected from having to defend this suit at all, including having to participate in discovery. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

After an evidentiary hearing, the Magistrate entered an order on January 11, 1988, denying plaintiff's request to hold the motion for summary judgment in abeyance for discovery. As will be discussed below, plaintiff has failed to adequately allege that defendants were doing anything other than performing acts which are within the scope of their duties as prosecutors, judges, or witnesses. Based on the entire record and relevant law, the Magistrate's ruling is completely consistent with this Court's finding that the State Government defendants are immune from suit based on plaintiff's allegations herein. Plaintiff has failed to show that the Magistrate's ruling was either clearly erroneous or contrary to law. See 28 U.S.C. § 636(b) (1) (A). Accordingly, the objection to the Magistrate's order will be overruled.

Motions to Dismiss

As noted supra, plaintiff was required by this Court's Dismissal Order to address the following in his Amended Complaint: the capacity of the defendants sued (whether sued in their individual or official capacities), specifics relating to the rights allegedly violated, and the immunity defense. Having reviewed the Amended Complaint and relevant law, the Court finds that plaintiff has failed to comply sufficiently with these three requirements of the Dismissal Order. Each requirement will be discussed in turn below.

Official and/or Individual Capacities

First, plaintiff failed to demonstrate that he is suing defendants in both their official and individual capacities. He claims to sue every defendant except Harvey in both capacities. Amended Complaint at 4 (unnumbered). His allegations, however, do not support such a claim. In each of the five counts of the Amended complaint, plaintiff seeks the same relief: "compensatory damages in excess of $10,000.00 and Punitive damages." All of the defendants except Harvey were state or county officials at all relevant times. The Eleventh Amendment only allows prospective injunctive relief to be granted against state officials, qua state officials, whose conduct violated federal law. Armstead v. Pingree, 629 F. Supp. 273, 278 (M.D. Fla. 1986); see Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98 (1984); Ex Parte Young, 209 U.S. 123, 159 (1908). Therefore, plaintiff has not asked for any relief which the Court could require of any defendant in his or her official capacity.

Sufficiency of the Complaint

Second, plaintiff has failed to allege sufficient facts to support his allegations of constitutional deprivations. The Amended Complaint does not have enough specificity to withstand even the relatively minimal standards of a motion to dismiss. The Court has applied the familiar standards for evaluating the complaint for purposes of a motion to dismiss. The factual allegations of the complaint are accepted as true, although legal conclusions couched as factual allegations are not. Papasan v. Allain, 478 U.S. 265, 286 (1986). The complaint is construed in the light most favorable to plaintiff, and a claim will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The Court recognizes that pro se complaints are held to less stringent standards than formal pleadings drafted by

lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972); Miller v. Stanmore, 636 F.2d 986, 988 (5th Cir. February 9, 1981) (Unit A).[1]

Also, the Federal Rules of Civil Procedure permit a litigant to plead generally and then develop the precise factual basis for his case by utilizing pretrial discovery procedures. See Conley, 355 U.S. at 45-46. Even under such "notice rules," however, "the complaint must state a cause of action sufficient to affirmatively show the plaintiff is entitled to relief." Fullman v. Graddick, 739 F.2d 553, 556 (11th Cir. 1984). Based on the entire record and relevant law, it "appears beyond doubt" that plaintiff cannot prove a set of facts to support any of the six counts in the Amended Complaint.

As the Court noted in the Dismissal Order, in civil rights actions, it is well settled that courts "consistently require the claimant to state specific facts, not merely conclusory allegations." Elliot v. Perez, 751 F.2d 1472, 1479 (5th cir. 1985); Fullman, 734 F.2d at 556-57; Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Dir. 1984) (stating that all circuits require civil rights plaintiffs to plead with particularity), cer. denied, 105 S. Ct. 1843 (1985).

While plaintiff in some instances has attempted to set forth the factual basis for his claims, his allegations are insufficient. Even where plaintiff has plead with some specificity the actions of certain defendants, he has failed to allege a causal link between the acts complained of and the alleged deprivation of his constitutional rights. See Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985). An official cannot be held liable under § 1983 unless his actions caused a constitutional tort. Baskin v. Parker, 602 F.2d 1205, 1208

1. The Eleventh Circuit in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981

(5th Cir. 1979; Dismissal Order at 7 (emphasis added).

Plaintiff challenges his removal from office. None of the named defendants had authority to remove plaintiff from office, however. Pursuant to the Florida Constitution, Article IV, § 7(A), only the Florida Senate can "remove" a state official from office. Although defendants participated in various ways in plaintiff's suspension from office and in the removal hearings, it was the Florida Senate which unanimously voted to remove plaintiff from office. Since the Florida Senate was dismissed with prejudice form this action, plaintiff is unable to state a causal connection between these defendants and any injuries he allegedly suffered from removal from office.

Also, plaintiff's allegations with regard to the existence of a conspiracy are wholly inadequate. A complaint alleging a conspiracy to deprive a plaintiff of his civil rights must contain more than mere conclusory allegations of conspiracy. See Henzel v. Gerstein, 608 F.2d 654 (5th Cir. 1979); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied 434 U.S. 1077 (1978). As stated by the First Circuit in Slotnick:

> In an effort to control frivolous conspiracy suits under § 1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts.

Id. at 33 (citations omitted).

While plaintiff's amended allegations as a whole fail to state a claim upon which relief can be granted, the inadequacy of the Amended Complaint is compounded by

the existence of immunity doctrines which have their basis in common law. The fact that all named defendants in this cause have claimed immunity [2] makes the pleading requirements of plaintiff more onerous. Elliot, 751 F.2d at 1482. The immunity defenses will be discussed in the next section.

Immunity

The final Dismissal Order requirement which plaintiff has failed to meet is the requirement to allege sufficient facts to establish that defendants are not immune from suit. The Dismissal Order instructed plaintiff to defeat, if possible, the immunity defenses. Plaintiff included allegations regarding the non-availability of immunity defences, but after carefully reading the Amended Complaint in the context of relevant law and the oral arguments, the Court is of the opinion that defendants' claims to immunity from suit have merit.

For the purposes of this opinion, the Court finds that all actions related to the actual suspension and prosecution of the suspension of plaintiff are "prosecutorial." The defendants who were involved in the suspension and "prosecution" of plaintiff are entitled to assert absolute prosecutorial immunity because their actions are analogous to the filing of a criminal information. All actions taken prior to the filing of the suspension order will be considered investigative in nature. Defendants involved in the investigative phases are entitled to assert qualified immunity if their actions were reasonable.

In Elliot, supra, the Fifth Circuit stated that a plaintiff in a 1983 action should be required to provide "a detailed complaint alleging with particularity all material facts which

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2. Although defendant Harvey did not specifically assert an immunity defense, the record is clear that she was merely a witness against plaintiff and a claim of witness immunity on her behalf would be as strong as the witness immunity claim of the other defendants.

he contends will establish his right to recovery, which will include detailed facts supporting the contention that [a] plea of immunity [by the defendant] cannot be sustained." 751 F.2d at 1482. As recognized by he Elliot court, the immunity doctrines have been developed to benefit the public as a whole and to "protect us from having the work of our public officials chilled or disrupted by participation in the trial or pretrial development of civil law suits." Id. at 1477.

In the instant case it is apparent that plaintiff has alleged all of the facts which he is capable of alleging as to these defendants. When taken individually or as a whole, plaintiff's conclusory allegations of conspiracy fail to defeat defendants' immunity defenses.

The Supreme Court noted that absolute immunity exists to shield the following types of defendants from civil damages actions: judges, prosecutors, witnesses and officials performing "quasi-judicial" functions. Mitchell, 472 U.S. at 520. In Marrero v. City of Hialeah, 625 F.2d 499, 504 (5th Cir. 1980), the court speculated that absolute immunity will be extended to those officers performing quasi-judicial functions.

In regard to defendants Austin, Greene and King, the activities they performed clearly resembled those of a prosecutor involved in the judicial phase of a criminal proceeding. See Whelehan v. County of Monroe, 558 F. Supp. 1093, 1098 (W.D.N.Y. 1983). Therefore, these defendants are absolutely immune from suit under § 1983. To defeat this immunity and state a cause of action against them, plaintiff had the burden of alleging with specificity that Austin, Greene, and King acted outside the scope of their duties as prosecutors. Plaintiff attempted to meet this burden in the Amended Complaint. Plaintiff alleges that these defendants used perjured testimony and participated in a conspiracy to remove him from office. These allegations are clearly insufficient to defeat the defendants' claim of

absolute prosecutorial immunity because prosecutors are immune from such actions. See Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (extending absolute prosecutorial immunity to allegations that a prosecutor knowingly used false testimony and suppressed material evidence at trial).

Defendants Graham, Linthicum and Parton are, likewise, entitled to prosecutorial immunity for all actions associated with the filing and prosecution of the suspension orders. These three defendants are entitled to qualified immunity for all actions taken in the investigative stages of the suspension. Plaintiff has failed to sufficiently allege that any of these defendants' actions were performed in violation of the requirements of Article IV, § 7(a) of the Florida Constitution and Florida Statute § 112.

Plaintiff asserts that he was denied due process based upon defendants Graham, Linthicum and Parton's alleged failure to inform him of the charges against him prior to the initiation of the investigation of misconduct charges against him. Plaintiff relies upon Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

Plaintiff's reliance on Old Dominion Dairy is misplaced. The D.C. Circuit held in that case that the government violated a dairy supplier's due process liberty right where it rejected the supplier's bids based on contracting officers' determinations that the supplier lacked integrity and responsibility, without giving the supplier any notice that its integrity was at issue. In contrast, plaintiff in the instant case received substantial notice of the grounds for his suspension in Executive Order 83-1 and Executive Order 83-40. Plaintiff received a full hearing before defendant Kahn, acting as Special Master on behalf of the Florida Senate, at which plaintiff was represented by competent counsel. The findings of the Special Master were submitted to the Florida Senate. Pursuant to Article IV, § 7(a), the Florida Senate unanimously voted to remove

plaintiff from office.

Defendant Kahn claims to be absolutely immune from this suit under the doctrine of judicial immunity. In Stump v. Sparkman, 435 U.S. 349 (1978), the Supreme Court held that a judge is not liable in a § 1983 action if he has not acted in the "clear absence of all jurisdiction and if his act is a judicial one." Id. at 357 (citations omitted). The Supreme Court also held that a judge, as long as his acts are within his subject matter jurisdiction, will not lose this immunity even if his actions are erroneous, malicious, or in excess of his authority. Id. at 339.

The immunity which shields a judge from § 1983 liability has been extended to officials with discretionary power similar to that exercised by a judge. See Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983), cert. denied 469 U.S. 832 91984). In Scott, the Eleventh Circuit discussed the process a court must follow in determining whether judicial immunity extends to a particular officer:

> In order to determine whether absolute immunity extends to [an individual], it is important to consider the "reasons underlying the creation of the immunity shield." The reasons for extending judicial immunity are to protect those officials with discretionary power similar to that exercised by a judge and thereby to ensure courageous exercise of that discretionary power. The question which must be answered with regard to the extension of absolute judicial immunity, therefore, is whether the act performed by the officer is discretionary.

Id. at 1546 (citation omitted). Under Florida law, when the legislative branch of Florida government sits in its judicial capacity in impeachment or removal proceedings, it sits as a "court."

It is clear to the Court that Kahn, in his capacity as Special Master, performed functions normally performed by a

judge. Kahn dealt with plaintiff at all times in his "judicial capacity." Kahn, therefore, is immune even if he committed the errors alleged by plaintiff, since Kahn's actions were performed within the scope of his delegated authority under Fla. Stat. § 112. See Butz v. Economou, 438 U.S. 478, 513-14 (1978).

In the present case, plaintiff accuses various defendants with acting in a willful and malicious manner which denied plaintiff his right to a fair and impartial hearing. He classifies Lawrence, Terrell, Dempsey, and Patrick as admitted perjurers. Amended Complaint at 11. likewise, plaintiff alleges defendant Hammond, Doyle and Harvey gave or conspired to give false testimony. The underlying policy reasons for granting absolute immunity to judges and prosecutors supports the extension of absolute immunity to witnesses. Imbler, 424 U.S. at 439.

In Briscoe v. Lahue, 460 U.S. 325 (1983), the Supreme Court applied the functional analysis developed in Imbler and refined Butz to the precise issue of whether a police officer who testifies as a witness can be liable for damages under § 1983. The Supreme Court found that a police officer giving testimony performs the same function as any other witness. "[H]e is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury." Id. at 342. Therefore, the police officer was determined to be entitled to absolute immunity.

Under the rationale of Briscoe and other relevant law, the witnesses herein, defendants Lawrence, Terrell, Dempsey, Patrick, Doyle, Hammond and Harvey, are absolutely immune in this § 1983 suit. In order to state a cause of action against one or more of the witnesses, plaintiff had to allege specific facts showing that defendants deprived him of constitutional rights and in so doing acted under color of law and outside the scope of their immunity.

In an attempt to overcome the mandate of Briscoe, plaintiff alleges the existence of a conspiracy on the part of defendants Lawrence, Dempsey, Patrick, Doyle, Terrell, Hammond,Harvey, King and Greene. Plaintiff alleges that their actions occurred during the investigative state of the proceedings and that the proceedings in which the testimony was given were not judicial proceedings. Plaintiff asserts that these factors preclude defendants' entitlement to absolute immunity. Each of plaintiff's assertions are without merit and must fail.

As noted supra, plaintiff's allegations of conspiracies are inadequate. Regardless of the existence of a conspiracy, however, the actions in which these defendants are alleged to have engaged relate solely to testimony given as part of the investigation of the charges against plaintiff and the presentation of evidence before the Special Master. Defendants, therefore, remain entitled to absolute immunity. See Alioto v. City of Shivey, 835 F.2d 1173, 1174 (6th Cir. 1987). Where the only thing a defendant is alleged with specificity to have done is to appear as a witness and give testimony, he or she would have absolute immunity for those acts. See Kukla v. Village of Antioch, 647 F. Supp. 799, 815 (N.D. I11. 1986) (applying Briscoe to situation in which a police chief testified before an employment board).

Similarly, plaintiff's allegations pertaining to the giving of testimony prior tot he actual hearing before the special Master must fail because any such testimony was given in furtherance of the removal proceedings. In the instant case, there are no specific allegations that the witness-defendants improperly submitted affidavits upon which plaintiff was arrested or charged, investigated plaintiff, placed or pursued any of the charges against plaintiff, or initiated or conducted hearings. Instead, from plaintiff's allegations and the record, it is apparent that the testimony of defendants Lawrence, Dempsey, Patrick, Doyle, Terrell, Hammond, and Harvey was given in response to the demand of the investigating

State Attorney or Special Master and pursuant to judicial process.

As recognized in Alioto, supra, "the doctrine enunciated in Briscoe v. Lahue also shields from liability the alleged conspiracies to give false and incomplete testimony in judicial proceedings." 835 F.2d at 1174 (citing Macko v. Byron, 760 F.2d 95, 97 (6th Cir. 1985)). The Alioto court applied this doctrine even though the plaintiff in that case alleged the conspiracy took place during the investigative stage of the criminal charges against plaintiff, well before the actual giving of testimony.

Plaintiff also attempts to defeat defendants' claim of qualified immunity by alleging that defendants violated clearly established rights of which a reasonable person would have known. With regard to defendants Graham, Linthicum, and Parton, plaintiff alleges that their claim of qualified immunity was lost due to their actions during the investigation phase. However, no right to notice prior to the initiation of an investigation exists in the Eleventh Circuit, in either criminal or civil proceedings. Defendants Graham, Linthicum, and Parton's actions were objectively reasonable and did not violate plaintiff's due process rights under the clearly established case law in existence at the time of the suspension by defendant Graham. See Muhammad v. Dugger, 839 F.2d 1422 (11th Cir. 1988). Defendant's subjective intent is irrelevant to the Court's determination of entitlement to qualified immunity. Anderson v. Creighton, 483 U.S. 635, 639 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

Summary Judgment

Although a ruling on the State Government Defendants' motion for summary judgment is not necessary in view of the Court's disposition of the motions to dismiss, the Court has alternatively reviewed the motion for summary judgment and has determined that it has merit. The motion

is based on defendants' argument that "[a]ll acts complained of were within the scope of the duties of the defendants. Within these duties they are entitled to absolute immunity for acts as prosecutor, judge or witness." Memorandum of Law in Support of Motion for Summary Judgment at 6.

In the order denying plaintiff's motion to hold the motion for summary judgment in abeyance, entered on January 11, 1988, the Magistrate allowed plaintiff ten days to file a supplemental response to the motion for summary judgment. After plaintiff filed a motion to hold the January 11, 1988 order in abeyance and filed a twelve-page objection to the January 11, 1988 order, the Magistrate entered an order on February 1, 1988, which abated the January 11, 1988 order pending disposition of the objections thereto. Plaintiff, therefore, never filed a supplemental response. Plaintiff did have an opportunity to present additional evidence and oral argument in response to the motion for summary judgment at the hearing on November 28, 1988. Also, the Court considered all of his filings and the entire file when considering defendants' motion for summary judgment.

A discussion of defendants' immunity within the context of summary judgment would be substantially the same as the discussion above in the context of the motions to dismiss. The conclusion is the same: defendants are immune from suit based on the facts and circumstances of this case.

Having reviewed the motion for summary judgment, responses, oral arguments, entire file and relevant law,the Court finds that defendants have demonstrated that there are no material facts in dispute with regard to the immunity issue and defendants would be entitled to a judgment as a matter of law if the motions to dismiss had not been granted.

Conclusion

Plaintiff's objections to the Magistrate's order must be overruled because plaintiff has failed to demonstrate that the order was clearly erroneous or contrary to law. Also, the Amended Complaint must be dismissed because it fails to state a claim against any defendant as a matter of law and all fourteen defendants are entitled to absolute and/or qualified immunity from suit.

The fact that defendant Harvey did not file a motion to dismiss will not prevent the dismissal of this action as to her. The only allegations against Harvey appear in Count IV in which she is alleged to have conspired with defendants Doyle, King and Greene to give false testimony. The granting of Doyle's and the State Government Defendants' motions to dismiss will eliminate all defendants except Harvey from the conspiracy alleged Count IV. Since it takes two to form a conspiracy, the count will have to be dismissed. Of course, as noted above, the allegations of Harvey's participation in the facts giving rise to this case were that she testified against plaintiff and allegedly conspired to testify falsely against him. Her testimony is an action for which she is entitled to absolute immunity, as discussed above.

For the foregoing reasons and having carefully reviewed the entire file and relevant law, the Court finds that this cause should be dismissed with prejudice. Accordingly, it is

ORDERED AND ADJUDGED:

1. That the Objection to the Court's [Magistrate's] Ruling on Denial of Discovery of the Defendants, filed herein on January 20, 1988, is hereby overruled;

2. That the Magistrate's Order dated January 11, 1988, is hereby adopted and affirmed;

3. That Defendant L.A. Morris Doyle's Motion to Dismiss Amended complaint, filed herein on October 7,

1987, is hereby granted;

4. That the Motion to Dismiss filed herein on October 13, 1987, by defendants John E. Lawrence, Lawrence David Dempsey, Mark Luther Patrick and Charles Terrell, is hereby granted;

5. That the Motion to Dismiss filed herein on October 16, 1987, by defendants Governor Bob Graham, Barbara Linthicum, Steve Parton, Ed Austin, Baker King, Ralph Greene,D. Stephen Kahn, and Judge Kim Hammond, is hereby granted;

6. That the Motion for summary Judgment, which was originally filed herein on February 4, 1987, and renewed on October 1, 1987, by defendants Governor Bob Graham, Barbara Linthicum, Steve Parton, Ed Austin, Baker King, Ralph Greene, D. Stephen Kahn, and Judge Kim Hammond, is moot, but would be granted if the motions to dismiss had not been granted;

7. That this case is hereby dismissed with prejudice; and

8. That the Clerk of the Court is hereby directed to enter judgment in favor of defendants and dismiss this case as to all defendants, with costs to be assessed according to law.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 21st day of March 1990.

Howell W. Melton
UNITED STATES DISTRICT JUDGE

Copies to:
Hon. Howard T. Snyder, United States Magistrate
Mr. Daniel H. Bennett, pro se
Counsel of Record
Jo Ann Harvey Scott

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 86-863-Cic-J-12

DANIEL H. BENNETT,
Petitioner

versus

GOVERNOR BOB GRAHAM, et al.,
Respondents

NOTICE OF APPEAL

Notice is hereby given that DANIEL H. BENNETT, Petitioner above named, hereby Appeals to THE UNITED STATES COURT of APPEALS for the 11th circuit, Middle District of Florida from the Final Judgment from The U.S. DISTRICT COURT entered on 21st day of March, 1990, and entered into this action on the 19th day of April, 1990.

Daniel H. Bennett
Daniel H. Bennett, pro se
Petitioner
P.O. Box 1493
Bunnell, Fl 32010

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

NO. 90-3310

DANIEL H. BENNETT,
Petitioner

versus

GOVERNOR BOB MARTINEZ, et al.
Defendants

(D.C. Civil No. 86-00863-J-12)
Dated May 14, 1990

NOTICE OF APPEAL FILED: April 24, 1990

The referenced case has been docketed in this court. After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. Requests for extensions of time to file a response may not be entertained. Please do not address any other issues on appeal at this time.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may

be required to resolve the jurisdictional issue(s). If a transcript has been ordered [See Fed.R.App.P. 10(b)], it is appellant's responsibility to make arrangements with the court reporter to postpone the preparation of the transcript pending a determination of the jurisdictional issues, if this is desired. The parties will be advised by this office of the court's determination and of any further actions which may be required.

Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen (14) days. [11th Cir. R. 46-1]. Only counsel who enter an appearance will be noted on the docket. Persons appearing pro se need no file an appearance form.

Sincerely,

MIGUEL J. CORTEZ, Clerk

Reply To: Brenda Hauck (404) 331-3843
c: District Court Clerk

NO. 90-3310

JURISDICTIONAL QUESTION(S)

Whether the notice of appeal was untimely because filed more than 30days after entry of final judgment? Fed.R.App.P. 4(a) (1).

Final judgment entered on docket: March 21, 1990
Notice of appeal filed: April 24, 1990

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

NO. 90-3310

DANIEL H. BENNETT,
Petitioner

versus

GOVERNOR BOB GRAHAM, et al.,
Respondents

(D.C. DKT NO. 86-863-CIV-J-12)

—

RESPONSE TO COURT'S QUESTION OF JURISDICTION

—

NOW COMES THE PLAINTIFF DANIEL H. BENNETT, pro se and files this response to the Court's question of jurisdiction.

When the Plaintiff received the notice from this Court dated May 14, 1990 it was the first and only indication that Plaintiff may be considered untimely in filing his Notice of Appeal.

The Plaintiff lists the following reasons of Good Cause for the Court's consideration.

1. The District Court entered it's Order of Judgement on March 21, 1990. However, the notice of the Order did not reach the Plaintiff until April 17, 1990..

2. The Plaintiff receives his mail via post office box. The Plaintiff is out of town several days each week and as a common practice picks up his mail on the weekends and usually one other day during the week. The Plaintiff checked his mail on Saturday prior to April 17th. At that time there was not a notice to pick up other mail at the window. However on April 17th there was a notice to pick up mail at the main window. In the mail that was picked up at the window was the Plaintiff's notice from the District Court.

3. The Plaintiff's mailbox on April 17th contained very little mail and no explanation was given as to why Plaintiff's mail was at the general delivery window.

4. The Plaintiff filed his Motion for Appeal within 48 hours after the notice of the judgment from the District Court.

5. The notice of judgment to the Plaintiff from the District Court was absent of any notice from the Clerk of the Court notifying the Plaintiff of the necessity of filing a timely Motion.

6. The Plaintiff filed his notice of appeal by U.S. Mail prior to the 30day time period.

7. After the Clerk of the District Court received the Plaintiff's Motion for Appeal apparently on April 24, the clerk failed to notify the Plaintiff of a possible untimely filing and his right to file for an extension of time.

The Plaintiff feels that he has done everything within his knowledge and power at the time of filing his appeal to be proper and timely. However, after reviewing the notice from this Court it appears the Plaintiff's Motion maybe considered untimely.

The Plaintiff argues that he is not at fault if this Court would in fact consider his Motion to be untimely, and bases his argument on the following:

A. The delay of the mail to reach the Plaintiff is certainly a major factor to be considered. If the mail had not been delayed the Plaintiff would have had time to research case laws and FRAP to be able to determine the proper

rules that controls the time of appeals.

B. Secondly it appears the Clerk of the District court failed to properly notify the Plaintiff to the importance of a timely appeal.

C. Thirdly it appears the Clerk of the District Court failed to properly notify the Plaintiff that his Notice of Appeal may be considered untimely, and of his right to request an extension of time for the running of the second 30day time period.

CITATION OF AUTHORITY:
In Campos v. LeFevre (825 F.2d 671 2nd. cir. 1987) it states that the United States Courts of Appeals gave and set specific instructions for Clerks of the District Courts to follow when any judgment is entered, whether the litigants are pro se or not.

In Campos at 672 3. "District court clerks offices should screen notices of appeal for timeliness and advise pro se litigants of appropriateness of extension motion. F.R.A.P. Rule 4(a) (a) (1), 28 U.S.C.A.."

Also at 4. "District Court Clerks must prepare notice to be given all litigants whether or not pro se, and whether plaintiff's or defendants, at time judgment is entered, to inform litigants of time limitations of filing notice of appeal and of necessity of filing timely motion for extension within 30 day extension period if notice of appeal is untimely. F.R.A.P. Rule 4(a), (a) (1), 28 U.S.C.A.

In view of the above if this Court denied the appeal of the Plaintiff, the Plaintiff would in fact be held responsible for actions of others that are not in his control. Also in view of the same the Plaintiff's position seems to be an example of why the decision of Campos v. Lefevre came about.

THEREFORE, the Plaintiff Respectfully Requests for this Court to accept Jurisdiction of this appeal or to do any other

action necessary to protect the Plaintiff's right of Appeal.

ENTERED INTO THIS 29th day of May 1990 by hand delivering to The UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, ATLANTA, GEORGIA.

Daniel H. Bennett
Daniel H. Bennett, pro se
P.O. Box 1493
Bunnell, Fl 32010
(904) 736-1789
(904) 437-3755

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been furnished by U.S. Mail to Keith Tischler, Esquire, 318 North Monroe St., Tallahassee, FL 32301; Victor Halback, Jr., Esquire, P.O. Box 447, Jacksonville, Fl 32201 and to Arthur C. Walberg, Assistant Atty. General, Suite 1501, The Capitol, Tallahassee, FL 32301.

Daniel H. Bennett
Daniel H. Bennett, pro se

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

July 23, 1990

David L. Edwards, Clerk
U.S. District Court
311 West Monroe St.
Jacksonville, FL 32201

RE: 90-3310 - BENNET vs. GOV. BOB MARTINEZ, ET AL.
DC Docket No.: 86-863-CIV-J-12

Dear Sir:

Enclosed is a certified copy of this Court's order dismissing the above referenced appeal for lack of jurisdiction. This order is issued as and for the mandate.

Please acknowledge receipt on the attached copy of this letter.

Sincerely,
MIGUEL J. CORTEZ, Clerk

By Brenda McConnell, Deputy Clerk

enc.
c: Daniel H. Bennett
Arthur C. Wallberg
Victor M. Halbach, Jr.
Joann H. Scott
Keith C. Tischler
Information Systems
Minutes
Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

NO. 90-3310

DANIEL H. BENNETT,
Plaintiff-Appellant,

versus

GOVERNOR BOB MARTINEZ, THE STATE OF FLORIDA,
BARBARA LINTHICOM, ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the Middle District of Florida

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Before KRAVITCH, HATCHETT and CLARK, Circuit Judges

BY THE COURT:

The appeal is DISMISSED for lack of jurisdiction. The notice of appeal was untimely because it was not filed within thirty (30) days of the entry of the district court's final judgment in this civil action: Fed.R.App.P. 4(a) (1); Campbell v. Wainwright, 726 F.2d 702 (11th Cir. 1984).